

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001

July 16, 2010

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|---------------------------|---|-----------------------------|
| EUGENE BADONIE,           | : | DISCRIMINATION PROCEEDING   |
| Complainant               | : |                             |
|                           | : | Docket No. WEST 2009-1342-D |
|                           | : | Case No. DENV-CD-2009-15    |
| v.                        | : |                             |
|                           | : | Mine Name: Kayenta Mine     |
| PEABODY WESTERN COAL CO., | : | Mine ID: 02-001195          |
| Respondent                | : |                             |

**DECISION**

Appearances: Eugene Badonie, Kayenta Arizona *pro se*;  
Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak, Stewart, P.C.,  
Washington DC on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint of Mr. Eugene Badonie pursuant to Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 *et seq.*, the “Act”, alleging that on May 1, 2009 he was transferred by the Peabody Western Coal Company (Peabody) from a position as a day shift (first shift) supervisor to the “undesirable” position as a midnight shift (third shift) supervisor in violation of Section 105(c)(1) of the Act.<sup>1</sup> Mr. Badonie acknowledges that he suffered no loss of pay, benefits or seniority as a result of the transfer. He had since been transferred to the second shift but wants to be returned permanently to the first shift.

In order to establish a *prima facie* case of a violation of Section 105(c)(1) of the Act, the

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<sup>1</sup> Section 105(c)(1) of the Act provides, in relevant part, as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.....

complainant must prove that he engaged in an activity protected by that section and that the adverse action complained of was motivated in any part by that activity. See *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), rev'd on other grounds, *sub nom. Consolidation Coal Co. v. Marshall* 663 F. 2d 1211 (3<sup>rd</sup> Cir. 1981); *Secretary Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981)

It is undisputed that Mr. Badonie engaged in protected activities on April 30, 2009<sup>2</sup>. On that date, Badonie was working the third (midnight) shift filling in for the absent regular supervisor. The truck drivers were complaining to him about “the perpendicular angle at the push”. According to Badonie, the drivers were “not being permitted to be perpendicular to the dump” at the J-28 stockpile causing them to operate in a “rough” area. More particularly, it appears that the trucks were being driven over four-foot-high windrows and the drivers were complaining, as a result, that some were suffering back pains. Mr. Badonie then filed “a safety alert-life threatening notification” by way of a “BD02” (a form of electronic messaging) complaint regarding this matter to corporate headquarters around 7:18 a.m. (Exhibit C-11). Badonie designated the condition as “life threatening” and, under the DB02 system, such a report results in an automatic E-mail back to mine management informing them of the complaint. It is clear therefore that all senior managers were aware of Badonie’s “life threatening notification” by 7:18 a.m. on April 30, 2009, (Exhibit C-11). The records indeed show that Senior Production Manager Barry Grass was already responding to the complaint by 8:43 a.m. (Exhibit C-11).

Around 5:00 or 6:00 a.m. on May 1, 2009, Barry’s brother, Jonas Grass, called Badonie into his office and told him that he had been called by Barry thirty minutes before and was told to inform him that he had been transferred to the third shift. According to Badonie, Jonas provided no reason for the transfer. Badonie testified that he considered resigning over the weekend but the following Monday he met with Scott Williams who was in a superior position to the Grass brothers and was told only that “moving men around was a tradition at the company”. At some point in time Badonie also asked Barry Grass why he had been reassigned and Barry told him that he had been replaced with Norman Sneddy because he had never before evaluated Sneddy and wanted to move him to day shift to evaluate him. There is no dispute that the first shift supervisor is considered the lead-supervisor for all three shifts and has greater responsibilities for assigning work on all three shifts.

At the conclusion of the Complainant’s case at trial, I found that he had engaged in protected

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<sup>2</sup> At hearings, Mr. Badonie also claimed six other alleged protected activities. I find however that the two safety grievances filed on behalf of another employee when Badonie was a union representative (and before he was promoted to management) in January 1998, and letters to Mr. Grass in January and April 2008 complaining about equipment being returned from the maintenance shop without the correction of certain safety defects, were too remote in time and of a nature to be expected in the ordinary course of his duties to have been a motivating factor in his shift change in May 2009. I further find that a grievance filed in December 2001 on behalf of an employee initially denied family leave and a complaint of alleged sexual harassment in February 2004 were not protected under the Act.

activity and that he had met his initial burden of showing that his transfer to the third (night) shift was motivated at least in part by that protected activity. Here, not only was there clearly knowledge of Badonie's protected activities on the part of Barry Grass, the official who recommended the transfer of Badonie, but the transfer was made less than a day after his April 30, 2009, protected activity.

The operator may rebut the *prima facie* case by showing either that no protected activity occurred, or that he adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n. 20. While acknowledging Badonie's protected activities, Peabody maintains that it made the decision to transfer Badonie in late April 2009, prior to his April 30<sup>th</sup> safety complaint and that, accordingly, the transfer was not, and could not have been, motivated by that protected activity. In this regard, Peabody presented credible evidence that Badonie's assignment to the third shift was part of an overall reorganization of management and supervisory responsibilities at the mine to be effective May 1, 2009. (Exhibits. R-1, R-2 and R-3).

The reorganization was the result of a company-wide initiative called "Center of Excellence" (COE) which entails reviews by a team of managers studying organization and procedures at an operation and making recommendations for improvement. The COE at the Kayenta Mine was completed on April 17, 2009. According to the undisputed evidence it was recommended in the review that management of the operating pits be divided so that one set of managers would be in charge of one pit and a separate set of managers would be in charge of the other pit. This was deemed necessary because of the mine's large size (one hundred square miles of permitted property) and because the two main operating pits are located 14 miles apart. Previously, one set of managers and supervisors would work both pits, which involved excess travel time between the pits.

In the reorganization, Barry Grass and Randall Hendrix ( in an equivalent position to Grass) were made production managers overseeing the supervisors at the separate pits: Grass was over the J19 and J21 and Hendrix over the N9 pits (Exhibit R-2). They were each to have their own respective sets of supervisors (Exhibit R-2). In the reorganization, Norman Sneddy was placed on first shift as pit supervisor in the J19 and J21 pit area, Lewis Pavinyama was in that position on the second shift and Badonie was placed in that position on the third shift. This is the pit area under Barry Grass. The pit supervisors manage the dump truck and backhoe operations at their assigned pit.

Badonie's position before the reorganization involved supervising reclamation activities and managing the dozers. In the reorganization, that position was eliminated and the supervision of the dozers was placed under the pit supervisors for each respective pit. According to the credible evidence, Sneddy was placed on first shift rather than Badonie because Barry Grass wanted to directly supervise Sneddy to evaluate him. In the first shift position, Sneddy would be given more responsibility than the pit supervisors on the other shifts, because the first shift supervisor is the lead supervisor responsible for planning the work on all three shifts. Since Barry Grass works on the day shift, Sneddy would have to work on the first shift in order for Grass to be able to directly supervise Sneddy. Before this, Sneddy had been working on the third shift for a long time . He had not been a lead shift supervisor before and had not worked directly for Barry Grass before.

According to the credible evidence, the details on job responsibilities and assignments in the reorganization were completed in various meetings involving the director of production, Gregg Kitchen, Randall Hendrix, Barry Grass and Renee Lorents, the senior manager of human resources. These meetings began around Monday, April 20<sup>th</sup> and the final decision on the new job assignments was made by April 24<sup>th</sup>.

In one of the meetings that week, the reorganization was diagramed out on a “white board” and the resulting chart and notes were printed out directly from the “white board” using its internal printer. (Exhibit R-3). That chart shows that Badonie was to be made a pit supervisor on the third shift in the reorganization and that the change would be effective May 1<sup>st</sup> (Exhibit R-3). That chart was brought to Lorents by the end of the week of April 20<sup>th</sup> for her to use in preparing the final organization chart for the reorganization. Gregg Kitchen made the final decision on the reorganization, including Badonie’s new position on the third shift, prior to Badonie’s April 30<sup>th</sup> complaint and was based on recommendations from Barry Grass and Randall Hendrix.

It is undisputed that it had been, and is, standard practice for the company to move people around. Indeed, prior to the transfer at issue in this case, Badonie had been moved approximately every twelve months to a different supervisory job or to a different shift and Badonie acknowledged that he was aware that the company moves supervisors to different positions and different shifts due to promotions, reorganizations and other operational reasons. In fact, Badonie had previously been assigned to the first and second shifts and had filled in for others on the third shift. As of May 1<sup>st</sup>, Badonie had already been working the third shift for three months, while the regular third shift supervisor was on leave.

Within this framework of credible evidence, I find that, indeed, the decision by Peabody to transfer Badonie to the third shift had been finalized by April 24, 2009, six days before his protected safety complaint on April 30, 2009. Accordingly, the decision to transfer him was not motivated by that safety complaint and this proceeding must be dismissed.

### **ORDER**

Discrimination proceeding Docket No., West 2009-1342-D is hereby dismissed.

Gary Melick  
Administrative Law Judge  
(202) 434-9977

Distribution:

Eugene Badonie, P.O. Box 1712, Kayenta, Arizona 86033

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 2400 N Street NW,  
5<sup>th</sup> Floor, Washington, DC 20037

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